No. 89-1499

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

A.F. PLAZZO

and

PLAZZO INSURANCE SERVICES, INC.,
Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY, and
NATIONWIDE PROPERTY AND CASUALTY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 20, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the status of an independent-contractor insurance agent as an "employee" for purposes of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), should be determined by reference to common-law agency principles?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide General Insurance Company and Nationwide Property and Casualty Company (collectively, "Nationwide")[1] hereby submit

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[1] Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Respondents is included as an Appendix to this Brief. References to "App." are to the Appendix included with the Petition.

their Brief in Opposition to the Petition for Writ of Certiorari filed by A.F. Plazzo and Plazzo Insurance Services, Inc. (collectively, "Petitioners") in the above-named case.

This case concerns the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), to an incentive compensation arrangement provided by Nationwide to certain of its insurance agents, including Petitioners. That arrangement includes a conventional provision that imposes a financial penalty (loss of future payments) in the event the agent engages in contractually specified competitive activities. Nationwide believes that ERISA is inapplicable to this arrangement because, *inter alia*, Petitioners were not "employees" of Nationwide within the meaning of ERISA, which is a predicate to application of that statute. While the standard for determining "employee" status under ERISA is an important federal question, the court of appeals below properly applied common-law agency principles in making that determination, and there is not yet a clear conflict among the courts of appeals on this question. Accordingly, this Court should deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this matter, filed December 22, 1989, is included in Appendix B to the Petition at 81-90 and is reported (as a reversal without a published opinion) at 892 F.2d 79. That decision reversed the decision of the United States District Court for the Northern District of Ohio, decided October 21, 1988, which is reported at 697 F. Supp. 1437 and is included in Appendix A to the Petition at 24-80.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth at pages 1-2 of the Petition.

STATUTES INVOLVED

Section 3(6) of Title I of ERISA, 29 U.S.C. § 1002(6) (1982), provides: "The term 'employee' means any individual employed by an employer."

STATEMENT OF THE CASE

Nationwide is engaged in the business of underwriting insurance risks. It enters into agency relationships with sales agents to place its policies. That relationship is governed by an Agent's Agreement between Nationwide and the agent. The Agreement specifies that the agent is to act in the capacity of an independent contractor. App. 27, 82.

In 1961, Petitioner A.F. Plazzo ("Plazzo") became an insurance agent for Nationwide and continued in that capacity until 1983. Plazzo's relationship with Nationwide was governed by a series of successive Agent's Agreements. The district court below found, and the court of appeals affirmed, that pursuant to the Agreements, Plazzo maintained his own business, including providing his own office space and hiring his own employees. He exercised managerial skill in operating his business, determining the manner and means by which he attempted to sell insurance policies. He maintained bank accounts to pay the expenses of operating his business. He established a health insurance plan and a Keogh retirement plan for himself and his employees. Nationwide paid Plazzo solely on a commission basis, and Plazzo reported to the Internal Revenue Service that he was self-employed. Plazzo enjoyed such success as an insurance agent that, in 1980, he took his son into his business and built his own office building. In 1982, Plazzo formed a corporation, Plazzo Insurance Services, Inc. ("PISI"). Plazzo arranged with Nationwide to terminate his individual Agent's Agreement and replace it with an agency agreement between PISI and Nationwide. App. 27-28, 64-70, 82-83, 89-90.

The Agent's Agreement was modified in 1969 to provide an additional form of agent compensation, currently referred to as the Agents Security Compensation Plan ("ASCP"). The ASCP was designed to provide an incentive to agents to increase Nationwide policy sales, and was conditionally payable after termination of the agency with Nationwide. The Agreement expressly provided that ASCP payments would not be made if the former agent engaged in the insurance business within a 25-mile radius of his Nationwide location during the first year following agency termination, or in certain other circumstances. App. 26-27, 84-85.

In 1983, Nationwide properly exercised its right to cancel its Agreement with PISI. Nationwide subsequently determined that Plazzo's son, with the assistance of Plazzo, was continuing in the insurance business at their Nationwide location, representing other insurance companies and inducing Nationwide policyholders to change their policies to those other companies. In accordance with the Agreement, Nationwide therefore made no ASCP payments to Plazzo or PISI. App. 28-29, 83-85.[2]

Petitioners brought an action in federal district court alleging that ERISA precluded the enforcement of the conditions for ASCP payments against them, and seeking those payments and other relief.[3] The parties agree that, if ERISA is applicable in this matter (which depends on the "employee" issue as well as certain other issues), the minimum vesting requirements of Section 203 of Title I of ERISA, 29 U.S.C. § 1053 (1982 & 1987 Supp.),

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[2] Whether Nationwide's determination was correct under the terms of the Agreement was not raised below by Petitioners. App. 29 n.5.

[3] Petitioners did not challenge the validity of the ASCP provisions under applicable state law. The ASCP conditions have been upheld by other courts as a reasonable financial penalty that neither restrains competition nor otherwise offends public policy. *See, e.g., Nationwide Mutual Insurance Co. v. Tatem*, 210 Va. 693, 173 S.E. 2d 818 (1970) (predecessor ASCP provision).

would not permit enforcement of the ASCP conditions on the facts of this case. However, that vesting requirement is applicable by its terms only to "employee pension benefit plans," which in turn are limited by statutory definition to specified arrangements for "employees." *See* ERISA § 3(2), 29 U.S.C. § 1002(2) (1982).

The district court below reasoned that "employee" status under ERISA is to be determined by reference to common-law precepts. App. 47-62. It looked to the factors of "employee" status enumerated in the Restatement (Second) of Agency § 220 (1958) ("Restatement").[4]

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[4] Section 220 of the Restatement defines "servant" as follows:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

In reviewing the facts, the district court found factors indicative of both employee and independent contractor status, but concluded that Plazzo should be treated as Nationwide's "employee" for ERISA purposes. App. 64-69. After resolving various other issues in favor of Petitioners, the district court ruled that Plazzo was entitled to ASCP payments.

On appeal, the court of appeals found it necessary to address only the ERISA "employee" issue. Subsequent to the district court's decision below, the Court of Appeals for the Sixth Circuit held that ERISA "employee" status is to be determined under the common-law standard, enumerating twelve relevant criteria. *See Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245 (6th Cir. 1989) (reproduced in App. 93-120). Although the district court below applied "similar common law criteria," the court of appeals ruled that the district court had drawn the wrong legal conclusion from the facts it had found. The court of appeals held that the facts were indistinguishable from its prior decision in *Wolcott* and that Plazzo was not Nationwide's "employee," and therefore reversed the district court's judgment. App. 87-90.

REASONS FOR DENYING THE WRIT

The Petition appears to allege two reasons for this Court's review of the decision below: (1) a difference among the courts of appeals as to the standard to be applied in determining ERISA "employee" status (Petition at 12-16); and (2) failure of the court of appeals below to apply the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a) (Petition at 16-21). Neither reason has merit.

The latter contention patently does not justify this Court's review of the decision below. Petitioners' essential objection is that the court of appeals drew a different legal conclusion from the facts than did the district court. Such a contention relates solely to the manner in which the instant case was decided and raises no

legal principle worthy of this Court's decision. Furthermore, it is elementary that the court of appeals may freely review questions of law, without the deference accorded to the district court's decision by the clearly erroneous rule. *See, e.g., U.S. v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). The ultimate characterization of an individual as an employee or as an independent contractor—the legal significance of the facts found by the trier of fact—is a question of law. *See, e.g., Holt v. Winpisinger*, 811 F.2d 1532, 1536 & nn.30, 31 (D.C. Cir. 1987). The Petition cites neither conflicting decisions among the circuits nor important federal considerations on this point.

While the question of the standard to be applied in determining ERISA "employee" status may eventually merit this Court's attention, such consideration would be premature at this time. The statutory definition of "employee" in section 3(6) of ERISA, 29 U.S.C. § 1002(6) (quoted above), does not provide clear direction as to the standard to be applied. Two courts of appeals have determined that familiar common-law agency principles should govern under ERISA: the Sixth Circuit in *Wolcott, supra*, and the D.C. Circuit in *Holt v. Winpisinger*, 811 F.2d 1532, 1538 & n.44 (1987). These courts correctly observed that, under the statutory provisions for coordinating the tax and labor law titles of ERISA, tax regulations govern the ERISA vesting requirements at issue in this case[5] and those regulations adopt the common-law test of "employee" status.[6] *See Wolcott*, 884 F.2d at 250-251; *Holt*, 811 F.2d at 1538 n.44.

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[5] Section 3002(c) of ERISA, 29 U.S.C. § 1202(c), provides in relevant part that regulations prescribed by the Secretary of the Treasury under the Internal Revenue Code vesting requirements shall also apply to the counterpart vesting requirements of ERISA, and forbids the Secretary of Labor from adopting inconsistent regulations.

[6] The pertinent Treasury regulation provides that "[e]very individual is an employee if under the usual common-law rules the

In contrast, a panel of the Court of Appeals for the Fourth Circuit has concluded that "the common-law test for the relationship of master and servant is not the appropriate standard for application" under ERISA. *See Darden v. Nationwide Mutual Insurance Co.*, 796 F.2d 701, 706 (4th Cir. 1986), *on remand*, 717 F. Supp. 388 (E.D.N.C. 1989), *cross appeals pending*, Nos. 89-2759(L), 89-2760 (4th Cir.). The *Darden* case also involved the effect of ERISA on the enforceability of the ASCP conditions against a former Nationwide agent. The court of appeals in *Darden* cited *United States v. Silk*, 331 U.S. 704 (1947) (defining "employee" for purposes of the Social Security Act) and *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (defining "employee" for purposes of the National Labor Relations Act) as authority to define "employee" in light of the purposes of the statute. The court then announced a novel, three-part test for ERISA "employee" status:

> (1) Whether the "employer" took some action that created a reasonable expectation on the "employee's" part that retirement benefits would be paid in the future;
>
> (2) Whether the "employee" relied on that expectation by remaining for "long years," or a substantial period of time, in the "employer's" service and by foregoing other significant means of providing for retirement; and
>
> (3) Whether the "employee" lacked sufficient bargaining power to obtain contractual rights to non-forfeitable retirement benefits. 796 F.2d at 706-707.

The court of appeals remanded the *Darden* case to the district court.[7] After further proceedings, the district

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relationship between him and the person for whom he performs services is the legal relationship of employer and employee." 26 C.F.R. § 31.3121(d)-1(c)(1).

[7] Nationwide's request for a rehearing, or rehearing *en banc*, in *Darden* was denied. 796 F.2d at 701.

court entered judgment in part for Nationwide and in part for the former Nationwide agent.[8] Cross appeals were taken, and the *Darden* case was again argued to the Fourth Circuit on April 3, 1990. That court's decision remains pending.

The standards for ERISA "employee" status as articulated by the Sixth and D.C. Circuits and by the Fourth Circuit are different. On its face, the *Darden* test is an unworkable standard that provides little useful guidance for distinguishing among putative "employees" and that threatens inconsistent and insupportable results in specific applications. In developing that standard, the *Darden* opinion not only neglects the relevant regulations and other authorities cited herein, but also misapplies the precedents on which it relies. This Court in *Silk* and its companion case, *Bartels v. Birmingham*, 332 U.S. 126 (1947), held that "employee" should be defined for Social Security Act purposes by common-law principles realistically applied. *See Silk*, 331 U.S. at 713-716; *Bartels*, 332 U.S. at 130.[9] This is precisely the standard adopted for ERISA purposes by the Sixth and D.C. Circuits. In *Hearst*, this Court did define "employee" under the NLRA primarily by reference to "the history, terms and purposes of the legislation" (322 U.S. at 124), much like the court in *Darden*. However, Congress subsequently repudiated that approach and reinstated common-law agency principles. *See, e.g., NLRB v. United*

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[8] In relevant part, the district court held on remand that the former agent was Nationwide's "employee" for ERISA purposes and that a portion of the ASCP (the so-called "DCIC" payments) was a "pension plan," but that the remainder of the ASCP (the "Extended Earnings" payments) was not a "pension plan" subject to ERISA. 717 F. Supp. at 391-397.

[9] *See also Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1, 3 (1962), *reh. denied*, 370 U.S. 965 (1962), noting that the Social Security provisions, as amended subsequent to *Silk* and *Bartels*, "specifically adopt the common-law test for ascertaining the existence of the employer-employee relationship."

Insurance Co., 390 U.S. 254, 256 (1968).[10] Accordingly, the *Darden* test is founded on an erroneous understanding of both ERISA and precedent.

The *Wolcott* and *Holt* interpretation of ERISA follows the conventional legal understanding of the term "employee."[11] It accords with several decisions in which this Court has concluded that "when Congress has used the term 'employee' without defining it, . . . Congress intended to describe the conventional master-servant relationship as understood by common law agency doc-

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[10] The legislative history of the NLRA amendment graphically states the view of Congress that the proper test from the outset had been the common-law test:

> An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up [in its administrative decision in *Hearst*]. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors". . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words no farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee". [H. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947), *reproduced in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 292, 309 (1948).]

[11] It is a basic precept of statutory interpretation that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

trine." *Community for Creative Non-Violence v. Reid*, —— U.S. ——, 104 L. Ed. 2d 811, 824, 109 S. Ct. 2166, 2172 (1989) (adopting common-law principles to define "employee" for purposes of the "work made for hire" provisions of the Copyright Act of 1976).[12] The *Holt* and *Wolcott* interpretation also conforms to the federal labor laws generally, which define "employee" status by reference to common-law agency principles.[13] Finally, that interpretation best reflects the legislative history of ERISA. The concerns reported to and evinced by Congress during its extensive hearings[14] and reports[15]

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[12] For cases reaching the same conclusion under the Federal Employers Liability Act, see, *e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323, (1974), and the cases cited therein.

[13] *See, e.g., NLRB v. United Insurance Co., supra*, 390 U.S. at 256 (NLRA); *Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (noting that the National Labor Relations Board has adopted common-law test).

[14] Hearings on Private Pension Plans before the Subcommittee on Fiscal Policy of the Joint Economic Committee, 89th Cong., 2d Sess. (April-May 1966); Hearings on H.R. 1045, H.R. 1046 and H.R. 16462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st and 2d Sess. (December 1969, February-May 1970); Hearings on H.R. 1269 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. (April 1971); Hearings on Tax Proposals affecting Private Pension Plans before the House Committee on Ways and Means, 92d Cong., 2d Sess. (May 1972); Hearings on S. 3598 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. (June 1972); Hearings on S. 4 and S. 75 before the Subcommittee on Labor and Public Welfare, 93d Cong., 1st Sess. (Feb. 1973); Hearings on H.R. 2 and H.R. 462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 93d Cong., 1st Sess. (Feb.-April, June 1973); Hearings before the Subcommittee on Private Pension Plan Reform of the Senate Committee on Finance, 93d Cong., 1st Sess. (May-June 1973).

[15] S. Rep. No. 127, 93d Cong., 1st Sess. (1973); S. Rep. No. 383, 93d Cong., 1st Sess. (1973); H. Rep. No. 533, 93d Cong., 1st Sess. (1973); H. Rep. No. 779, 93d Cong., 2d Sess. (1974); H. Rep. No.

preceding the enactment of ERISA in 1974 related to traditional private pensions for employees at common law or covered by collective bargaining agreements. *See generally Schwartz v. Gordon*, 761 F.2d 864, 868 (2d Cir. 1985). Nothing in the text of this "comprehensive and reticulated statute"[16] indicates that Congress intended any other meaning.

Accordingly, *Wolcott* and *Holt* represent the better-reasoned interpretation of ERISA. Common-law agency principles are the proper standard for determining the status of an individual as an "employee" under ERISA, and that standard should be followed in all the circuits.

At this time, however, it is unclear whether the inappropriate "employee" formulation in *Darden* will result in decisions inconsistent with common-law agency principles. The Fourth Circuit is currently considering application of the *Darden* standard in the very case in which that standard was announced. In resolving the pending appeal, the Fourth Circuit may well clarify or elaborate its prior opinion in *Darden*. For example, Nationwide has argued on appeal that the "reliance" element of the Fourth Circuit test properly takes cognizance of the entrepreneurial opportunities of the putative "employee," a consideration akin to the common-law

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1280, 93d Cong., 2d Sess. (1974) (conference report); S. Rep. No. 1090, 93d Cong., 2d Sess. (1974) (conference report).

[16] *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980), *reh. denied*, 448 U.S. 908 (1980). This Court has consistently declined to modify judicially the legislative judgments embedded in the statutory scheme of ERISA. *See, e.g., Guidry v. Sheet Metal Workers National Pension Fund*, —— U.S. ——, 107 L.Ed.2d 782, 110 S. Ct. 680 (1990) (declining to approve an exception for employee malfeasance or criminal misconduct to the unqualified ERISA prohibition on the assignment or alienation of benefits); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985) (declining to expand ERISA statutory remedies for improper or untimely processing of benefit claims to include extra-contractual damages).

factors of the Restatement. Until the Fourth Circuit (either through its panel or, possibly, *en banc*) has applied its *Darden* test, it remains speculative whether that test will in practice conflict with the test prevailing in the Sixth and D.C. Circuits.

Thus, the standard for ERISA "employee" status is currently pending before the lower federal courts in a posture that may either clarify the law or effectively resolve a possible conflict among the courts of appeals. Until the issue is sharpened by further decision by the courts of appeals, any consideration by this Court would be premature.

CONCLUSION

The Petitioners' request for certiorari presents no issue that warrants this Court's consideration at this time. Therefore, the Petition for Writ of Certiorari should be denied.

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APPENDIX

The following statement is provided pursuant to Rule 29.1 of the United States Supreme Court Rules, which requires that this brief include a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Respondents.

Respondents are members of a group of corporations that includes commonly owned or managed stock and mutual insurance companies, mutual funds, and other companies. Ownership interests in these companies outside the corporate group are limited to the interests of mutual insurance policyholders and mutual fund stockholders. The following list sets forth the Respondents, parent companies of the Respondents, and mutual insurance companies and mutual funds affiliated with the Respondents:

Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company
Nationwide Life Insurance Company
Nationwide General Insurance Company
Nationwide Property and Casualty Insurance Company
Employers Insurance of Wausau A Mutual Co.
Wausau County Mutual Insurance Company
NGC County Mutual Insurance Company
Farmland Mutual Insurance Company
NIF/Nationwide Money Market Fund
NIF/Nationwide Bond Fund
Nationwide Investing Foundation Fund
Nationwide Investing Foundation Growth Fund
Nationwide Corporation